United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

UNITED STATES DISTRICT COURT 74-1061 B

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

Magistrate's Docket No. 2

V.

: Case Nos. 59, 63, 65 & 68

DANIEL VALERIANO, ET AL

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* *
* 74-1061 *
* C.A. No. T-3061 *
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APPENDIX

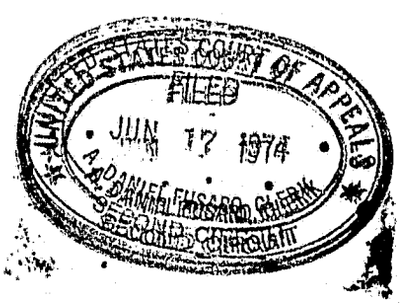
Appellant in the above captioned matter represents that there were no docket entries in said matter for the reason that the four search warrants regarding the above captioned matter were issued by a United States Magistrate.

The appellant further represents that the Motions to Suppress were pre-indictment motions filed in accordance with Rule 41 (e) of the Federal Rules of Criminal Procedure and were heard by U.S. District Judge Jon O. Newman. A copy of said ruling is attached hereto.

Appellant also submits copy of Index to Record on Appeal.

THE APPELLANT

By Anthony J. Lasala
Reilly, Peck, Raffile and Lasala
205 Church Street
New Haven, Connecticut 06508



UNITED STATES DISTRICT COURT

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RULING ON DEFENDANTS' MOTION TO SUPPRESS

This is a motion pursuant to Fed. R. Crim. P. 41(e) for return of property seized by agents of the Federal Bureau of Investigation under the authority of four search warrants issued by a federal magistrate on July 16, 1973.

On the basis of an affidavit of a special agent of the F.B.I., Magistrate Latimer found probable cause to believe that evidence of a numbers policy operation conducted in violation of 18 U.S.C. §§ 1955 and 371 was concealed at four locations: on the person of Daniel Valeriano, movant; at his residence at 58 Dixwell Avenue, New Haven, Connecticut; in the movant's 1973 blue Cadillac; and at 11 Simsbury Street, Waterbury, Connecticut. The magistrate issued four separate warrants authorizing special agents of the F.B.I. to search the person of the movant, his 1973 automobile, and each of the above-mentioned premises and to seize any gambling paraphernalia designed or intended for use, or which had been used, in the conduct of an illegal numbers policy operation.

On July 16, 1973, at 5:15 p.m., F.B.I. agents searched the premises at 11 Simsbury Street, Waterbury, and, finding the movant and his 1973 automobile at the premises, also searched the person of the movant and his 1973 Cadillac. The movant's residence at 58 Dixwell Avenue, New Haven, was searched on the same day at 5:22 p.m. On July 18, 1973, the return for each warrant and the inventory of property seized pursuant to each warrant were filed.

Although the movant has not been indicted, on September 17, 1973, he filed separate motions seeking return of all property seized. The motion alleges lack of probable cause and illegal issuance or execution of the warrant for the movant's person.

The movant does not detail any claim that the allegations of the single affidavit presented in support of all four warrants were insufficient to give the Magistrate probable cause to believe that the items to be seized were at the various locations, and such a claim would be pointless in view of the extensive and timely detail in the affidavit that fully met applicable standards. See United States v. Ventresca, 380 U.S. 108 (1965); Aguilar v. Texas, 378 U.S. 108 (1964). Rather his memorandum contends that the affidavit is vulnerable because the affiant reported the results of a court-ordered interception of the movant's telephone, and the claim is made that the wiretapping was unlawful in two respects.

The first claim with respect to the wiretap is that the notice of wiretapping, which must be served ninety days after the termination of the period covered by a wiretap order, 18 U.S.C. § 2518(8)(d), was given by letter dated July 10, 1973, whereas ninety days after the period of the authorized intercept would have been April 30, 1973. The Government responds that pursuant to the last sentence of § 2518(8)(d), two extensions of time for service of the required notice were obtained. Movant does not dispute that extensions were obtained, nor challenge whether the required good cause existed. His point is that the notice failed to advise him that the extensions had been obtained.

Section 2518(8)(d) does not require that the notice contain reference to extensions of time for service of the notice, and no reason appears why such a requirement should be read into the statute. If, as occurred here, the notice arrives beyond ninety days from the end of the period of the authorized interception, an aggrieved person has sufficient notice to challenge the wiretap on that ground. The Government will then have to demonstrate the existence of extensions and, upon proper challenge, justify their allowance. All this can readily occur on a motion brought by an aggrieved party pursuant to 18 U.S.C. § 2518(10). See United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972); United States v. LaGorga, 336 F.Supp. 190, 194 (W.D. Pa. 1971). The fact that the notice omits mention of the extensions does not in any way impair the opportunity to challenge their propriety.

The second claim is based on 18 U.S.C. § 2518(9), which provides that the contents of any intercepted communication shall not be received in evidence or otherwise disclosed in any "trial, hearing, or other proceeding" unless each "party" has received ten days earlier a copy of the authorizing court order. Movant claims the disclosure of the intercepted conversations to the Magistrate at the ex parte application for the search warrants violates this provision. The statute plainly refers to adversary proceedings, those to which there is some other "party" to whom a copy of the authorizing order should be given. It does not apply to applications for search warrants. See 1968 U.S. Code Cong. & Admin. News 2194-195.

The movant's attack upon the issuance or execution of the warrant for the search of his person is based upon the undisputed fact that the copy of the warrant left with him at the time of the search pursuant to Fed. R. Crim. P. 41(d) did not contain any identification or description of any person in the blank space after the printed words "on the person of." Since the original warrant filed with the Clerk of this Court on July 18, 1973, pursuant to Fed. R. Crim. P. 41(f), contains the requisite identification and description of the movant, there is no basis for challenging the issuance of the warrant.

The testimony of the agents who obtained and executed the warrant established that the omission from the copy resulted from a clerical error in conforming the copy to

the original. Absent a showing of prejudice, errors concerning the copy left with a person searched or the return made to court do not invalidate a search, United States v. Saunders, Crim. No. H-23 (D. Conn. Mar. 25, 1971); United States v. Romano, 203 F.Supp. 27, 32 n. 10 (D. Conn. 1962), even when no copy at all is left with the person searched, United States v. Shea, Crim. No. H-316 (D. Conn. Oct. 18, 1972); United States v. Gross, 137 F.Supp. 244 (S.D. N.Y. 1956). Here the caption of the warrant accurately identified and described the person to be searched, and the clerical omission of the same language from the body of the warrant created no prejudice whatsoever. Cf. United States v. Averell, 296 F.Supp. 1004 (E.D. N.Y. 1969).

For these reasons, the motions to suppress are denied.

Dated at New Haven, Connecticut, this 28 day of November, 1973.

Jon O. Newman

Jon O. Newman
United States District Judge

74-1061

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

VS.

DANIEL VALERIANO, ET AL

MAGISTRATE'S DOCKET NO. 2
CASE NOS 59,63,65 & 68

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Appeal from Ruling on Petitioner's Motions to Supress

I HEREBY ACKNOWLEDGE RECEIPT OF THE CERTIFIED COPY OF ~~DOCKET~~ ENTRIES AND ORIGINAL PAPERS PAGED AS LISTED IN THIS INDEX.

DATE:

4/24/74 Elizabeth Wing asst. Clerk

A. DANIEL FUSARO
CLERK, U.S.C.A. 2nd CIR.